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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 632

SOUTHERN BLEACHERY & PRINT WORKS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fourth Circuit.

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INDEX.

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutory provisions involved	4
Statement of the case	4
Reasons for granting the writ	13
Conclusion	22
Appendix A—Statutes involved	23
Appendix B—Opinion Court of Appeals for the Fourth Circuit	27
Appendix C—Petition for rehearing denied	40

Cases Cited.

Consolidated Edison Co. v. NLRB, 305 U. S. 197 ....20, 21

Donnelly Garment Co. v. NLRB, 123 F. 2d 215, 224, 8th Cir. 21

Leland Gifford v. NLRB, 200 F. 2d 620 .....13, 15

NLRB v. Indiana & Michigan Electric, 318 U. S. 9, 28 20

NLRB v. Sidran, 181 F. 2d 671, 674-675, 5th Cir. 21

Ohio Power Company v. NLRB, 176 F. 2d 385, cert. den. 338 U. S. 899 .....13, 14, 17

Universal Camera v. NLRB, 340 U. S. 488 18

Statutes Cited.

Labor Management Relations Act of 1947:
Sec. 10 (b) 3

National Labor Relations Act:
Sec. 2 (3), 2 (11) and 14 (a) 10
Sec. 2 (11) 2, 3, 9, 13, 16, 17, 19
Sec. 8 (a) (1), (3) and (4) 10
Sec. 8 (a) (3) 11
Sec. 8 (a) (4) 11
Sec. 8 (a) (5) 10, 11
Sec. 10 (b) 18
Sec. 10 (e) 18
28 U. S. C. 1254 (1) 2
29 U. S. C., Sec. 141 4

Miscellaneous Cited.

Fifth Amendment to the Constitution of the United States 3

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To the United States Court of Appeals for the Fourth Circuit.

Southern Bleachery & Print Works, Inc., Petitioner herein, prays that a Writ of Certiorari issue to review the Judgment of the Court of Appeals for the Fourth Circuit entered in the above entitled cause, enforcing against Petitioner an Order of the National Labor Relations Board.

OPINIONS BELOW.

The Opinion Below (App. B, pp. 27-39, infra), is reported at 257 F. 2d 235. The Intermediate Report of the Trial Examiner of the National Labor Relations Board and the Decision and Order of the National Labor Relations Board in the unfair labor practice cases are reported at 118 NLRB 299. The Board's Decision in the Representation case, which forms part of the record here, is not reported in NLRB reports, but appears at B. A. 1 and 2.[1] The Supplemental Decision and Order of the Board in the Representation case is reported at 115 NLRB 787 and the Board's second Decision and Certification in the Representation proceeding is reported at 115 NLRB 1526.

JURISDICTION.

The Court Below entered its Judgment on July 29, 1958 (App. B, p. 27, infra), and denied a Petition for Rehearing on October 13, 1958 (App. C, p. 40, infra). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

I. (a) Where an employer delegates supervisory authority and responsibility to certain of its employees, including the authority and responsibility to direct the work of their subordinates, to recommend hiring, firing, discipline, wage increases, assignments, and/or retention, and the authority to grant or deny leaves of absence, may the Board find that such a delegation of authority does not constitute such employees "supervisors" within the meaning of Section 2 (11) of the Act, basing such finding on the

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[1] "B. A." and "R. A." refer to the Appendices to the Briefs filed by the Board and Petitioner, respectively, in the Court of Appeals.

fact that some or all of the employees to whom such responsibility and authority has been delegated have not exercised such authority frequently enough to satisfy the Board?

(b) May the National Labor Relations Board adopt and apply as a basis for determining whether or not employees are "supervisors" within the meaning of Section 2 (11) of the Act, a test of frequency of exercise of the delegated authority when the statutory definition of "supervisor" does not include such a test or criterion; and has not the Board by so doing amended the statutory definition of "supervisor" contained in Section 2 (11) of the Act?

II. (a) Is an Order of the Board finding that an employer has committed unfair labor practices under the Act valid and enforceable under the terms of the National Labor Relations Act where the employer has been denied an opportunity to present evidence substantiating and supporting its defense to the unfair labor practice charges?

(b) Did the Court below err in denying Petitioner's Motion for Remand by which it sought an opportunity to present the evidence supporting its defense; such opportunity having been denied it by the Board on the ground that such evidence might weaken, dispute, or relitigate, in part, certain findings and conclusions made by the Board as a result of a hearing in a non-adversary representation proceeding held some fifteen months prior to the hearing on the unfair labor practice charges?

(c) May the Board, consistent with the due process requirements of the Fifth Amendment to the Constitution of the United States and Section 10 (b) of the Labor Management Relations Act of 1947, deny Petitioner in an unfair labor practice proceeding an opportunity to present as its defense evidence showing that the employees whose discharge is alleged to have been violative of the Act were

in fact discharged because they failed or refused to perform the duties and functions assigned to them or to carry out valid instructions given them by their employer, on the ground that these duties, instructions and authority required to be performed were "supervisory" and that as a consequence evidence as to them was not admissible because the Board in a previous representation proceeding had found that these same employees were not "supervisors" due to the infrequency of exercise of the same authority and responsibility by them?

STATUTORY PROVISIONS INVOLVED.

This case arises under the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Sec. 141, et seq.), hereinafter called the "Act." The pertinent provisions of the Act involved are set forth in Appendix A, pp. 23-26, infra.

STATEMENT OF THE CASE.

On June 5, 1950, the Petitioner, as a result of its experience in the operation of its printing departments, determined that in its judgment it could obtain a better quality and quantity of production in the operations of these departments if it created separate units of employees for each machine, consisting of a Unit Supervisor, in lieu of the former machine printer, a back tender, a grey tender, and a can boy. It delegated to each Unit Supervisor the direction, control, and supervisory responsibility for his unit, as well as the duties of the former machine printers, and designated such Unit Supervisor as the working foreman in charge of his group (R. A. 25, 31). Petitioner recognized from its experience and business judgment that it could not vest responsibility for the actions or results obtained by a group in any individual and expect such vesting to operate successfully without simultaneously vesting in

such individual such authority over the members of his group as would be necessary to effectively carry out and enforce such responsibilities.

In creating this new operation the Petitioner vested in its Unit Supervisors full responsibility for the coordination and direction of the work of their respective units. It made them responsible for the quantity and quality of production on their respective units and for directing and supervising the men who made up the crew over which the Unit Supervisors were in charge. It simultaneously gave the Unit Supervisors authority to take disciplinary and other action necessary to effectuate such coordination and direction (R. A. 16, 25, 35, 37, 38, 45, 49; B. A. 151). Petitioner made clear to the Unit Supervisors and each member of each crew under each of them that the Unit Supervisors not only had the responsibility for the work and jobs, but also had the authority to exercise control and direction of each and every person who made up the unit, including the authority to recommend or reject promotions, retention, wage adjustments, and disciplinary action. Simultaneously with its advising of the Unit Supervisors and their subordinates of their authority and responsibility, the Petitioner issued a memorandum in writing to each Unit Supervisor specifying his authority and responsibility (G. C. Exhibit 2, B. A. 62-63).[2]

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[2] *Basic Responsibility of Unit Supervisor.* On and after the 5th day of June, 1950, you, as a unit supervisor, are to have complete responsibility for, and supervision of your unit. Some of the items covered by the over-all responsibility of each unit supervisor for the production, quality, and conduct of his unit are listed below.

(1) It is his responsibility to see that his unit delivers the maximum production consistent with satisfactory quality.

(2) He is responsible for the correct printing of the assigned cloth on each lot and also for the correct color being placed on the right rollers in each combination.

(3) He is responsible for deciding when his unit needs new lapping, blankets, bearings, steam packing and other mechanical re-

In May, 1955, approximately five years after the Petitioner reorganized its production on the unit system and vested in its Unit Supervisors the duties, authority and re-

placements and the requisitioning of same through his Section Foreman.

(4) Obtain what patches he thinks necessary on each job and after carefully checking them make his decision as to proceeding, stopping for correction of any defect, or to ask his Superior to confirm his judgment.

(5) To check, turn in, and be responsible for the accuracy of the time cards of the workers under him in his unit, namely, the back tender, grey boy, can boy and any extra worker assigned to his unit.

(6) Recommend the hiring, firing, transfer, merit rate increases, promotions and demotions of the workers on his unit.

(7) Instruct his workers in safety and the use of safety devices, and require them to wear safe clothes and do their work in the safest possible manner.

(8) Grant his workers permission to leave the room to go smoke, visit the Canteen or Cafeteria, First-Aid Room, or for any other legitimate reason and see that these privileges are not abused.

(9) Allow his workers to be absent from work for reasons he believes to be necessary and arrange with his Section Foreman or Overseers for a satisfactory, temporary replacement when needed. He is to investigate any unauthorized absence from work, and when, in his opinion, such absence is unnecessary, or is of such frequency or duration as to be a serious detriment to the satisfactory operation of his unit, to take the matter up with his Section Foreman and recommend disciplinary or other action.

(10) He is responsible for the conduct of his crew during working hours and should take the necessary steps to correct, report, reprimand or recommend disciplinary action for infractions of known company rules and violations of established standards of personal conduct.

From time to time these ten points of responsibility and authority will be expanded, not necessarily into additional points, but with the idea of giving you additional details and material in order that you will be better equipped to carry out the responsibility listed.

We recognize fully that during the first few weeks of this program there may be some of these matters about which you will need advice and assistance. Do not hesitate to ask for it, because you will only learn how to exercise these additional functions by exercising them and by being guided. Once the program is fully understood we shall expect you to not only carry it out, but to make suggestions to us for the further improvement and strengthening of it.

sponsibility set forth above, a Petition for Certification was filed with the National Labor Relations Board, hereinafter referred to as the Board, by the Machine Printers Beneficial Association, hereinafter referred to as the Union. A hearing was conducted by the Board on such Petition on May 5 and 6, 1955. Sufficient evidence was introduced in the Record of such hearing as to enable the Board to conclude in its Decision of July 26, 1955, that:

> "The Record clearly establishes that the Unit Supervisors not only were vested with supervisory functions in June, 1950, but that the employees in their work units were apprised of the new duties and **that the Unit Supervisors have, in fact, been exercising those functions.**" (Emphasis supplied.) (B. A. 1, 2.)

Thereafter beginning about the middle of August, 1955, Petitioner consolidated its two print rooms and moved them from two separate locations into a single, new, location and room. As part of this consolidation Petitioner eliminated the category of supervisors (Section Foremen) of the rank immediately above that of Unit Supervisors and delegated their responsibilities and authority to the Unit Supervisors in addition to those previously assigned. Four of the former Section Foremen were demoted to Unit Supervisor jobs. Petitioner determined to eliminate four Unit Supervisors to make places for these four demoted Section Foremen and also to eliminate three of its units. As a result of such consolidation and curtailment of forces, Petitioner terminated seven Unit Supervisors on August 19, 1955 (B. A. 185, 207, 209).

In August, 1955, the Union petitioned the Board for reconsideration of its Decision of July 26, 1955, supra, and sought oral argument. On September 30, 1955, the Board scheduled oral argument on the Petition for Reconsideration and granted to the Union and Petitioner thirty minutes

each to argue orally on the question of reconsideration of its former decision. There was no opportunity at such oral argument to present further evidence, and the Union, indeed, had none to offer. The Board itself did not seek or request further evidence.

Without notice that it would reconsider its first decision and without giving Petitioner an opportunity to present further evidence, on March 15, 1956, the Board, by a divided vote, reversed its decision of July 26, 1955, supra, and in a Supplemental Decision directed an election in a unit consisting of Petitioner's Unit Supervisors (B. A. 3-17). One member filed a dissenting opinion. In this Supplemental Decision, the Board in final essence concluded that:

> "To the extent that the 1950 instructions attempted to delegate to the machine printers power of authority beyond that of craftsman, **the absence for all practical purposes of the exercise of such authority negatives its existence.**" (Emphasis supplied.) (B. A. 10.)

Thus, in its first decision of July 26, 1955, the Board concluded that supervisory duties and authority were delegated and exercised by the Unit Supervisors and in its second decision of March 15, 1956, on the same record, it found that while the duties and authority had been delegated, that they had not been exercised frequently enough to warrant the Board's finding that the authority so delegated constituted the Unit Supervisors as "supervisors" within the meaning of the Act. Thus, the Board without further evidence and after finding that certain facts existed as a matter of evidence in the Record, in a complete volte face seemed to find that these facts had not existed although they were clearly established by the Record; and the fact of delegation, both orally and in writing, was undisputed in the Record. Likewise undisputed was

the fact that each member of the crew of each Unit Supervisor was expressly informed of the delegation of supervisory authority, responsibility and power to his Unit Supervisor and of the fact that said Unit Supervisor had full authority over his crew and their performance of their jobs. Thus, the Board devised and applied a new test superseding the statutory definition in Section 2 (11) of the Act which enumerates several disjunctive tests, the meeting of any one of which would have the legal effect of constituting an employee a "supervisor" within the meaning of the Act.

On March 19, 1956, Petitioner filed a petition with the Board for further reconsideration and remand. In view of the Board's adoption in its Supplemental Decision (supra), of the new "frequency of exercise" test relating to delegated supervisory authority and in the light of further changes and circumstances in its operation, Petitioner sought to have the Board receive further evidence as to the actual frequency of exercise of the supervisory authority delegated by it to its Unit Supervisors and evidence as to additional delegations of authority which had come about as a result of changes in Petitioner's operations, beginning in August 1955 (B. A. 18, 19). The Board denied this motion (B. A. 30).

In accordance with its Supplemental Decision, the Board held an election on April 10, 1956. Petitioner filed timely Objections to the election and to conduct affecting the results of the election (B. A. 20-24). On April 25, 1956, the Board's Regional Director issued his Report on the Objections (B. A. 24-26). Petitioner filed timely exceptions to the Regional Director's Report to the Board and again requested a hearing (B. A. 27, 32). The Board summarily rejected Petitioner's objections and request for hearing and certified the Union (B. A. 32, 34). Thereafter, Petitioner believing the Board to have been in error in direct-

ing it to bargain with the Union about its supervisory employees, advised the Union it would decline to honor the Board's certification because in its opinion said certification was issued in contravention of the Act.

An unfair labor practice charge was filed as a result of Petitioner's refusal to bargain and as a result of alleged illegality in the discharge of five of the seven Unit Supervisors separated by Petitioner in August 1955.

The Board's Regional Director issued a Complaint on July 13, 1956 (B. A. 63, 66) charging that Petitioner had violated Section 8 (a) (5) of the Act by refusing to bargain with the Union and that it had violated Section 8 (a) (1) and (3) and (4) of the Act as a result of its discharge of five of the Unit Supervisors discharged in August 1955. Petitioner filed its Answer denying the allegations of the violation of the Act and pointing out that the Board certification of a unit of supervisory employees was in direct contravention of Section 2 (3), 2 (11) and 14 (a) of the Act (B. A. 67, 69).

A Hearing was held on the unfair labor practice Complaint on September 18, 19, 1956, before a Trial Examiner of the Board. At that Hearing Petitioner attempted to introduce the evidence upon which its defense was based. The evidence consisted of testimony which would establish that Petitioner had discharged the Unit Supervisors (the five involved and two others not involved in the Complaint) because they had failed or refused to carry out duties, assignments, and functions required of them by Petitioner and evidence to show the continuous exercise of the supervisory authority and functions delegated and assigned by an overwhelming majority of its Unit Supervisors both beginning with the time of delegation of the authority in 1950 and during the period subsequent to the Board's hearing on the Respondent's Petition in May 1955.

The Trial Examiner declined to permit Petitioner to adduce such evidence (B. A. 37, 38, 54, 69, 73, 167-168, 191-194, 210-211, 218; R. A. 90, 98, 99, 111-115). The Trial Examiner ruled that since the Board in its Supplemental decision of March 15, 1956, had held that Petitioner's Unit Supervisors were not in fact "supervisors" within the meaning of the Act, that he would not accept evidence tending to dispute or attack the validity of the Board's Supplemental Decision or the evidentiary basis upon which the Board's findings were made. Moreover, the Trial Examiner refused to permit the Petitioner to establish by testimony the basis upon which the seven Unit Supervisors separated from its employ in August 1955 were selected by it. This evidence sought to be adduced by Petitioner related to the failure of the men discharged to exercise or carry out the duties, responsibilities and instructions Petitioner had given them, at a time when Petitioner's other Unit Supervisors were in fact carrying out such duties, responsibilities and functions; regardless of whether such duties, responsibility and assignments or instructions might have been sufficient to make them "supervisors" vel non, according to the Board's definition. Upon refusal of this evidence by the Trial Examiner, Petitioner made appropriate offers of proof which were likewise rejected.

On November 5, 1956, the Trial Examiner issued his Intermediate Report and Recommendations in the above matter (B. A. 36-51). The Trial Examiner found that Respondent had violated Section 8 (a) (5) of the Act by refusing to bargain with the Union concerning its Unit Supervisors and that it had violated Section 8 (a) (4) as a result of the discharge of five named Unit Supervisors. He recommended dismissal of the charge of 8 (a) (3) of the Act.

Respondent filed its Exceptions to the Intermediate Report of the Trial Examiner (B. A. 54). On June 24, 1957,

the Board issued its Decision, with one Member dissenting (B. A. 54-58) affirming the Recommendations of the Trial Examiner, except as to his finding of violation of Section 8 (a) (3) and reversing him in that particular. Thereafter, on July 5, 1957, Petitioner filed a further Motion for Reconsideration and Remand with the Board again seeking the opportunity to adduce its evidence, setting forth in detail its contention that it had been denied a fair hearing in the matter and relating seriatum the steps taken in an effort to obtain such a hearing (R. A. 115-125). This Motion was ultimately denied by the Board on October 25, 1957 (B. A. 60-61).

A Petition for Enforcement was filed in the United States Court of Appeals for the Fourth Circuit. In its Decision of July 29, 1958, the Court also affirmed the Board's Decision reciting as the basis for its decision the Board's holding, to wit:

> ". . . To the extent that the 1950 instructions attempted to delegate to the Machine Printers power or authority beyond that of a craftsman, the absence for all practical purposes of exercise of such authority negatives its existence. . . ."

and holding:

> ". . . This final decision must be accepted by us since there is evidence to support it, and the findings of the Board with respect to the questions of fact are conclusive under Section 10 of the statute, if they are supported by substantial evidence on the record as a whole . . . it is equally clear, however, that an employer cannot make a supervisor out of a rank and file employee simply by giving him the title and theoretical power to perform one or more of the enumerated supervisory functions. The important thing is the possession and exercise of actual supervisory

duties and authority and not the formal title . . ." (App. B, p. 33, infra).

The Court below likewise denied Petitioner's Petition for Remand to the Board which it had filed with the Court simultaneously with its Answer to the Petition for Enforcement.

Petitioner filed Petition for Rehearing with the Court below. The Petition for Rehearing was denied on October 13, 1958 (App. C, p. 40, infra).

REASONS FOR GRANTING THE WRIT.

I. The Court below adopted and approved the Board's concept that supervisory authority of the nature specified in Section 2 (11) of the Act which, according to the evidence, was shown without dispute to have been in fact delegated, could be disregarded in determining whether or not an employee met the statutory definition of "supervisor" if such authority was not exercised by the employee to whom it was delegated with sufficient frequency to satisfy the Board. Such concept amounts to a substantial amendment to the statutory definition of "supervisor" as specified in Section 2 (11) of the Act.

Moreover, the Decision of the Court below affirming the Board's holding in this regard is, we submit, in direct conflict with the holding of the Court of Appeals for the Sixth Circuit in **Ohio Power Company v. NLRB**, 176 F. 2d 385, cert. den. 338 U. S. 899; and the Decision of the Court of Appeals for the First Circuit in **Leland Gifford v. NLRB**, 200 F. 2d 620. The Courts of Appeals for the Sixth and First Circuits have clearly held that the vesting of, or possession of, any one of the authorities listed disjunctively in Section 2 (11) of the Act brings the employee vested with, or in possession of, such authority within the statu-

tory definition of "supervisor." The First and Sixth Circuits have expressly rejected the test prescribed by the Board here, and affirmed by the Court below, that it is the frequency of the exercise of the delegated supervisory authority which determines whether or not a given employee is in fact a supervisor within the meaning of the Act. Directly contrary to the holding of the Court below here, the Court of Appeals for the Sixth Circuit held:

> ". . . The wording of Sec. 2 (11) is unambiguous, and no absurd or futile results nor unreasonable effects 'plainly at variance with the policy of the legislation as a whole' are produced by following the plain meaning of the Act. Cf. United States v. American Trucking Associations, Inc., 310 U. S. 534, 543, 60 S. Ct. 1059, 84 L. Ed. 1345. It follows that it was error not to enforce the statute according to its terms.
>
> "The Board also erred as a matter of law in considering the test of the performance of supervisory duties to be the frequency of their exercise. It said in its amended decision: 'Assuming, arguendo, that the control operator does perform "supervisor" duties in major and minor emergencies, such as described hereinabove in the Respondent's offer of proof, this sporadic and infrequent exercise of authority is insufficient to invest him with the "supervisory cloak contemplated in the amended act."' . . .
>
> "Section 2 (11) covers any individual 'having authority . . . responsibly to direct . . .' It does not require the exercise of the power described for all or any definite part of the employee's time. **It is the existence of the power which determines the classification.** That power responsibly to direct exists here in uncontradicted . . ."
>
> **(In re Ohio Power Co. v. NLRB, supra, at pp. 387, 388.)** (Emphasis supplied.)

To like effect, the Court of Appeals for the First Circuit held in **NLRB v. Leland Gifford**:

> ". . . We think the statute does mean that once an individual has actually been clothed with genuine power to perform a supervisory function, he thereupon becomes a 'supervisor', even before an opportunity arises to exercise his power, and even though he may not often find it necessary to exert the power conferred. That is to say, one clothed with real power to discipline other employees, for instance, would be ipso facto a 'supervisor,' even though in a particular instance months, or perhaps in rare cases even years, might pass before any occasion ever arose calling for an exercise of the power. And we think the same principle must apply with respect to the other powers enumerated in the section, including the power 'responsibly to direct' other employees. . . . The evidence is that those who retained other men in their respective departments were expected to and did supervise those men, even though supervision did not take much of their time, with the result that most of their time was spent in routine production work . . ."
>
> **(NLRB v. Leland-Gifford Co., supra, at p. 626).**

It will be noted in the instant matter that, after discussing the nature of the various duties performed by Petitioner's Unit Supervisors, and after pointing out that a great number of them were, in the Board's opinion, duties customarily exercised by more skilled employees over less skilled employees, and without disputing the fact of the delegation of managerial and supervisory authority and the express notification to the Unit Supervisors and their subordinates of the fact that such delegation had been made, the Board nevertheless averted to its "frequency of exercise" theory as the ultimate basis for determining

whether or not any of the tests for "supervisor" status set out in Section 2 (11) had been met.

It is uncontradicted in the Record that the Petitioner actually delegated supervisory authority, informed and instructed each of its Unit Supervisors and their subordinates that the Unit Supervisors had the responsibility to exercise the duties and authority in the Ten Points of Responsibility (Fn. 2, p. 5, supra), and that it reiterated these instructions during the five or more years prior to the 1955 Representation Petition and for the several years thereafter.

The authority thus delegated to the Unit Supervisors did not derive from a sheet of instructions or list of authority and responsibilities, but it derived from Petitioner, which had an absolute right to delegate portions of its managerial and supervisory authority and vest such authority in its Unit Supervisors; and by such delegation and vesting of such authority transform, what might have been, prior to 1950, craftsmen or leadmen into "supervisors" within the statutory definition prescribed by Congress in Sec. 2 (11) of the Act.

The Court below affirmed the Board's action in refusing to honor the unimpeached evidence as to the delegation of authority, as well as the Board's refusal to give weight to other undisputed testimony, which it acknowledged was in the Record, that the delegated supervisory authority and responsibility had in fact been exercised by many, albeit not all, of the Petitioner's Unit Supervisors. Moreover, the Court below enforced the Board's Order which, for all practical purposes, makes any determination by Petitioner as to the feasibility and desirability of delegating certain supervisory authority to skilled craftsmen, subject to the Board's ultimate determination of whether or not, in the Board's judgment, such delegation is a feasible or prac-

tical way for the Petitioner to operate its business. The Decision thus makes it impossible for an Employer to assign supervisory duties and responsibilities and effectively see they are carried out by interdicting the discharge of a Supervisor, to whom such authority has been delegated, as a result of his failure to carry out the instructions or exercise in whole or in part the authority or responsibilities delegated to him by his Employer.

The ultimate theory upon which the Board's Decision, as enforced by the Court of Appeals below, is predicated appears, in the Board's own language, to wit:

> "To the extent that the 1950 instructions attempted to delegate to the Machine Printers power and authority beyond that of a craftsman [here the Board is clearly evading the powers and authority envisioned by Section 2 (11) of the Act] the absence for all practical purposes of exercise of such authority negatives its existence . . ." (B. A. 10).

Such a theory is in head-on conflict, we submit, with the above referred Decisions of the First and Sixth Circuit Courts of Appeals, and constitutes a substantial amendment to Section 2 (11) of the Act.

For the reason that the Board has thus continued to circumvent the clear mandate and provision of the Act in connection with the determination of supervisory status, it is submitted that this Court should accept this case, and grant the Writ and decree the proper scope and application of Section 2 (11) of the Act. This Court has not previously reviewed a case involving the interpretation of Section 2 (11) of the Act in this regard, although it has denied certiorari in a number of cases, including the Decision of the Sixth Circuit Court in **Ohio Power Co. v. NLRB**, supra, which involved the actual point here involved, and

where the Sixth Circuit expressly and specifically rejected the theory upon which the Board and the Court below have predicated the Decision in the instant matter.

II. The Petitioner points out further that the Writ should be granted for the additional reason that Petitioner has been denied an opportunity for a fair hearing and has been denied, contrary to the provisions of the National Labor Relations Act, an opportunity to present its testimony in support of its defense to the unfair labor practice charges here involved. The Act requires that the person complained of in an unfair labor practice case shall "have the right to give testimony at the place and time fixed in the Complaint . . . and that such proceedings shall, insofar as practicable, be conducted in accordance with the rules of evidence applicable to the District Courts of the United States under the rules of civil procedure for the District Courts of the United States . . . " [Section 10 (b) of the Act.] [29 U. S. C. #160 (b)]. The findings of the Board are not binding unless they are supported by substantial evidence in the Record considered as a whole [Sec. 10 (e) of the Act, 29 U. S. C. (160) (e)] (Universal Camera v. NLRB, 340 U. S. 488).

Petitioner's only opportunity to adduce evidence relating to its defense to the allegations in an unfair labor practice Complaint is, under the Board's regulations, at a hearing before the Board's Trial Examiner. This Petitioner was denied such right. The denial to the Petitioner of this right constitutes a denial of due process, even though the evidence sought to have been introduced in the Hearing by it, would have, or might have had, the effect of establishing that a previous decision of the Board, itself, was in whole or in part erroneous as a matter of fact or as a matter of law. Petitioner shows that in the entirety of this matter it has had only two opportunities to present

its evidence, one in the Representation Hearing in May, 1955 (prior to the filing of any unfair labor practice charge), when it presented evidence which was sufficient for the Board to decide that as a matter of fact and as a matter of law, Petitioner's Unit Supervisors were "supervisors" within the meaning of Section 2 (11) of the Act. Its second opportunity to present evidence was at the Hearing before the Trial Examiner on the unfair labor practice Complaint on September 18th and 19th, 1956. There the issue involved not only the question of the legality of Petitioner's refusal to bargain about its Unit Supervisors, but likewise involved the question of whether or not the Petitioner in August, 1956 (some fifteen months after the Hearing in the Representation matter), discharged five of its Unit Supervisors in violation of the Act. The Trial Examiner denied, and the Board affirmed his denial, to the Petitioner an opportunity to adduce pertinent and material evidence as to matters which had occurred subsequent to the May, 1955, Representation Hearing, and evidence which it believed would establish that its discharge of the Unit Supervisors in August, 1956, was not violative of the Act. Although Petitioner in its offer of proof and in its tendering of evidence contended that the evidence it sought to introduce, which was obviously relevant, was designed to establish that the basis of the discharge of the five Unit Supervisors involved was their failure or refusal to carry out its directions and instructions, while other Unit Supervisors were doing so. The Trial Examiner expressly ruled that he would not entertain or admit any evidence which tended to cast doubt upon the legal or factual validity of the Board's Supplemental Decision in the Representation case. In this instance even the dischargees, themselves, had agreed that the Petitioner had given them certain instructions orally and in writing and had communicated these instructions in their presence to their subordinates. Petitioner sought to prove by evidence before the Trial Ex-

aminer and subsequently in its several motions to Remand to the Board and to the Court below, how and wherein these discharged Unit Supervisors had failed to carry out such directions and instructions and to contrast their performance and actions in this connection with that of other Unit Supervisors not discharged. This was the crux of Petitioner's defense to the unfair labor practice charges in this particular. We submit that Petitioner was entitled as a matter of law to adduce evidence in support of its defense, regardless of whether such instructions admittedly given and apparently disobeyed, would, or would not, have constituted the dischargees "supervisors" within the meaning of the Act.

The Court below determined that the Board's Order was supported by "substantial evidence in the Record considered as a whole." Such a determination, we submit, should not be allowed to stand in an instance such as this where the Record itself is not complete as a result of the party, against whom the Complaint was directed, being denied an opportunity to present its evidence or its defense. The Record here, we submit, cannot be construed to be complete and the Order of the Board, which must be based upon substantial evidence in the Record considered as a whole, should not be allowed to stand where the party against whom it is directed has been denied its opportunity to present its relevant evidence supporting its defense to the charges. Such a right was denied to this Petitioner. It is submitted that such denial to this Petitioner of its right to submit evidence in support of its defense is a denial of its Constitutional right of due process of law under the Fifth Amendment, a denial of its rights provided in the National Labor Relations Act, and is contrary to the Decisions of this Court and the Court of Appeals. **NLRB v. Indiana & Michigan Electric**, 318 U. S. 9, 28, and **Consolidated Edison Co. v. NLRB**, 305 U. S. 197, where this Court said at pages 225-226:

". . . A more serious question grows out of refusal to receive testimony of certain witnesses . . . an offer of proof was made which showed the testimony to be highly important with respect to the reason for the discharges . . . We agree with the Circuit Court that the refusal to receive the testimony was unreasonable and arbitrary . . ."

(Consolidated Edison Co. v. NLRB, 305 U. S. 197.)

See also **Donnelly Garment Co. v. NLRB**, 123 F. 2d 215, 224, 8th Cir. (modified in part as to other matters at 330 U. S. 219), where the Court said:

". . . The truth is that a controversy tried before the Court or before an administrative agency is not ripe for decision until all competent and material evidence proffered by the parties has been received and considered . . ."

(Donnelly Garment Co. v. NLRB, 123 F. 2d 215, 224, 8th Cir.)

See also **NLRB v. Sidran**, 181 F. 2d 671, 674-675, 5th Cir.

It is submitted that the Writ of Certiorari should likewise be granted in regard to the denial to Petitioner of its right to adduce evidence in its defense to the unfair labor practice charges, and that the matter be remanded to the Court below for the purpose of having it remanded to the Board, in order that Petitioner be given an opportunity to adduce its evidence in defense against the unfair labor practice charges and have such evidence considered by the Board in connection with any Decision and Order in the instant matter.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this Petition for Certiorari should be granted.

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APPENDIX A.

Statutes Involved.

(1) Section 2, sub-sections (3) and (11) of the Labor Management Relations Act of 1947, 29 U. S. C. 152 (3) and (11); 61 Stat. 137.

"Definitions.

"Sec. 2. When used in this Act—

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

"(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

(2) Section 10, sub-sections (b) and (e) of the Labor Management Relations Act of 1947, 29 U. S. C. 160 (b) and (e); 61 Stat. 146.

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United

States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall

apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its members, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)."

(3) Section 14 (a) of the Labor Management Relations Act of 1947, 29 U. S. C. 164 (a); 61 Stat. 151.

"Sec. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

APPENDIX B.

United States Court of Appeals for the Fourth Circuit.

No. 7654.

National Labor Relations Board, Petitioner,

versus

Southern Bleachery and Print Works, Inc., Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

This cause came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the respondent on the 24th day of June, 1957, in proceedings before the Board entitled and numbered "Southern Bleachery and Print Works, Inc., Employer, and Machine Printers Beneficial Association of the United States, Petitioner, Case No. 11-RC-745" and "Southern Bleachery and Print Works, Inc., and Machine Printers Beneficial Association, Case No. 11-CA-960"; upon the answer of the respondent; upon the motion of respondent to remand the case to the Board for the taking of additional testimony; upon the transcript of record certified and filed in this court; and the said cause was argued by counsel.

On consideration hereof, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit that the motion of the respondent to remand be, and it is hereby, denied, that the said order of the National Labor Relations Board in said proceedings be enforced, and that the Southern Bleachery and Print Works,

Inc., abide by and perform the directions of the Board in said order contained.

Simon E. Sobeloff,
Chief Judge, Fourth Circuit.
Morris A. Soper,
United States Circuit Judge,
A. D. Barksdale,
United States District Judge.

Filed
Jul 29 1958
R. M. F. Williams, Jr.
Clerk

A true copy,
Teste:
s/ Richard M. F. Williams, Jr., Clerk,
U. S. Court of Appeals for
the Fourth Circuit.

United States Court of Appeals
For the Fourth Circuit.

No. 7654.

National Labor Relations Board,
Petitioner;
versus
Southern Bleachery and Print Works,
Inc.,
Respondent.

On Petition for Enforcement of an Order of
the National Labor Relations Board.

(Argued June 11, 1958 Decided July 29, 1958.)

Before Sobeloff, Chief Judge, Soper, Circuit Judge,
and Barksdale, District Judge.

Soper, Circuit Judge:

This petition for enforcement of an order of the Labor Board turns on the Board's determination that certain machine printers of the Southern Bleachery and Print Works, Inc. were not supervisors but employees of the company. The specific charges against the company are that it violated § 8 (a) (1) (5) of the Labor Management Relations Act by refusing to bargain with the Machine Printers Beneficial Association which had been certified as the bargaining representative of the machine printers, and also that the company violated § 8 (a) (1) (3) and (4) of the statute by discharging certain machine printers for giving testimony against the company in the representation case.

On March 21, 1953, the union petitioned the Board for an election in a unit of workers designated generally as machine printers, including journeymen and apprentices. The company contended in opposition that the machine printers had been made supervisors on June 5, 1950, and the Board sustained the contention and dismissed the petition. Thereafter the Board, upon the union's petition, reconsidered its action and after oral argument reversed its prior decision, one member dissenting, and ordered an election, which was held April 10, 1956, and resulted in a majority of 32-to-13 in favor of the union. Thereafter the Board certified the union as the bargaining representative of the employees and the union requested the company to bargain with it in regard to wages, hours and conditions of employment; but the company refused to bargain on the ground that the machine printers are supervisors and thereupon the proceeding now before us was instituted.

Section 2 (3) of the Act excludes from the definition of the term "employee," and therefore from the protection of the Act, "any individual employed as a supervisor." Section 2 (11) of the Act defines the term "supervisor" as:

> . . . any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Each printing machine is run by a crew of four men including a machine printer who stands in front of the machine and is primarily responsible for the production and quality of the printed cloth and exercises some authority over his less skilled helpers. They include a back tender who stands behind the machine, a grey tender who stands at the side and a can boy for every two machines. The issue of fact is whether each machine printer is a supervisor of the three helpers in his unit, or merely a lead man of greater skill and authority than his helpers but without supervisory authority as defined in the statute.

There were approximately forty machine printers, of whom thirty worked in three shifts in the print works, and ten who worked in two shifts in the shirting print in the bleachery of the company. In addition to the printers, whose status as supervisors is in dispute, there are eleven supervisors, including an overseer, three assistant overseers, five section foremen and two floormen in the print room; and six supervisors in the shirting print, including a shirting supervisor, two assistant overseers and three floormen. The total complement of the print room is one hundred sixteen, of which eleven are admittedly supervisors and thirty more are asserted by the employer to be supervisors. The total complement of the shirting print is forty-six, of which six are admitted to be supervisors and ten others are asserted to be such by the employer.

It is conceded that until June, 1950, the machine printers were not supervisors. Prior thereto, in 1943, 1948 and 1949, elections had been held in a unit of machine printers but no bargaining representative had been selected in any of these elections. In June, 1950, the employer changed the job designation of machine printer to that of unit supervisor and gave the printers a list of ten instructions entitled "Basic Responsibility of Unit Supervisor." These related to the responsibility of the printer as to the delivery of maximum production with satisfactory quality, correct printing of the cloth, decisions as to material requirements and mechanical replacements of the unit and instructions tending more clearly to show a supervisory status within the terms of the Act, including the responsibility to check on the time cards of the workers in his unit, to recommend their hiring and firing and rate increases, and to take necessary steps to report, reprimand or recommend disciplinary actions or infraction of company rules. In addition, the employer changed the method of computing the printers' pay by increasing their weekly base pay by $25.00 in lieu of a lower base pay and production bonus. They continued to receive a guaranteed base pay plus time and one-half for time over 40 hours a week, an arrangement not applicable to admitted supervisors on straight salary.

The crucial question for decision is whether the status of the machine printer was actually changed to such an extent on June 5, 1950, that he was transformed from a skilled worker, charged of necessity with a measure of control over his helpers on the unit, to a unit supervisor clothed with the characteristic authority described in the Act as not merely of routine or clerical nature, but requiring the use of independent judgment. The Board found this to be a nice question, as appears from its change from its earlier decision in favor of the employer's contention to a contrary decision after further examination of the evidence. Before June 5, 1950, as well as after, the operation of a machine

required the constant attention and much the greater part of the time of the head of the unit. He was obliged to check the quality of the cloth printed on his machine and to exercise the customary control of an experienced workman over his less skillful helpers. Since June 5, 1950, the printers have had the additional duty of initialing pay increase slips, time cards and material requisition slips, a function formerly performed by the overseers or assistant overseers. Testimony was given by certain unit supervisors at the hearing that since the institution of the new system in 1950 they had recommended pay increases for members of their crew which were honored by the management, and there was additional testimony that no pay increase was given to a member of any crew without the unit supervisor's approval. Similar testimony was given in regard to the filling of vacancies and in regard to the removal of an unsatisfactory employee. The evidence also showed that the pay of the helpers on the machines was computed upon time cards initialed by the machine printers and that requisitions for supplies were also initialed by them.

On the other hand, there was testimony tending to show that the additional duties imposed upon the machine printers on June 5, 1950, with respect to the initialing of increased pay slips, time cards, etc., were for the most part routine matters, especially as increases in pay, although not completely automatic, were usually allowed after a set period of time on the job. There was also testimony by five of the machine printers that although they had initially recommended that employees be hired, fired, given merit increases, promoted or demoted since 1950, the slips were signed by them routinely without the exercise of independent judgment and in some instances without examination or inquiry on their part, and that replacements were sometimes made without consultation with them.

The first decision of the Board in favor of the employer upon this conflicting testimony was issued July 26, 1955.

Thereafter the union petitioned the Board to reconsider its decision; and on August 19, 1953, while the petition was pending, the company discharged the five printers who had testified against it in the representation proceeding, alleging that the two print rooms have been combined and that the company was not satisfied with the way that the printers had carried out their duties as unit supervisors. After the rehearing was granted and oral argument was heard, the Board re-examined the testimony and rejected the employer's contention, and expressed its final conclusion in the following words:

> "On the basis of the above facts and the entire record, we are satisfied that the purported 1950 change in the status of the machine printers did not, in fact or in law, convert the machine printers to supervisors or deprive them of their employee status. The principal effect of the instructions given to the machine printers was to codify the control previously exercised by them over the less experienced grey tenders, back tenders and can-boys, a control, as we have indicated, that is customarily exercised by any skilled craftsmen over their helpers and apprentices. To the extent that the 1950 instructions attempted to delegate to the machine printers power or authority beyond that of a craftsman, the absence, for all practical purposes, of the exercise of such authority negatives its existence. We find, therefore, that the machine printers are employees within the meaning of the Act."

This final decision must be accepted by us since there is evidence to support it, and the findings of the Board with respect to questions of fact are conclusive under § 10 of the statute if they are supported by substantial evidence on the record as a whole. Our attention is called to certain decisions of the courts which point out that the definition of the term "supervisor" in the Acts is phrased in the disjunctive so that an employee who has authority in the interest of the

employer to perform any of the enumerated acts in the exercise of independent judgment acquires the status of a supervisor and, also, that the question of status is determined by the existence of the power rather than the frequency of its exercise. It is equally clear, however, that the employer cannot make a supervisor out of a rank and file employee simply by giving him the title and theoretical power to perform one or more of the enumerated supervisory functions. The important thing is the possession and exercise of actual supervisory duties and authority and not the formal title. It is a question of fact in every case as to whether the individual is merely a superior workman or lead man who exercises the control of a skilled worker over less capable employees, or is a supervisor who shares the power of management. In this case we have the unquestioned fact that after 1950, as before, the machine printers did the actual work of operating the machines and directing the activities of their helpers and, also, that during both periods a number of supervisors, assistant supervisors and foremen exercised authority over the printers. If the Board, taking these facts in consideration, accepted the testimony of witnesses for the Board, that the new authorities given to the printers on June 5, 1950, were largely of a routine or perfunctory nature, it cannot be said that the finding was unwarranted by the evidence or without support in the decisions of the court. See **Ohio Power Co. v. N. L. R. B.**, 6 Cir., 176 F. 2d 385; **N. L. R. B. v. Leland-Gifford Co.**, 1 Cir., 220 F. 2d 620; **N. L. R. B. v. Quincy Steel Casting Co.**, 1 Cir., 200 F. 2d 293; **Precision Fabricators v. N. L. R. B.**, 2 Cir., 204 F. 2d 567; **N. L. R. B. v. North Carolina Granite Corp.**, 4 Cir., 201 F. 2d 469; **N. L. R. B. v. Swift & Co.**, 9 Cir., 240 F. 2d 65.

In its final decision the Board held that the company was guilty of unfair labor practices in two particulars, (1) in refusing to bargain with the union and (2) in discharging five machine printers on August 19, 1955, because they had

testified in favor of the union and against the company at the representation hearing which was held on May 5 and 6, 1955. As to the first matter there is no dispute. It is admitted that the company refused to bargain with the union. Indeed, this was the only way that the company could test the decision of the Board, classifying the printers as ordinary employees rather than supervisors.

With respect to the second matter, the trial examiner held a hearing and made the finding on May 5, 1956, which the Board approved on June 24, 1957, that the five printers were discharged because of their testimony. There was substantial evidence to support this finding. In the latter part of April, 1955, after receiving notice that the Board would hold the representation hearing on May 5, 1955, the superintendent of the print works addressed all the printers on three shifts. His speech was in manuscript and carefully prepared. He informed the printers that the hearing would be held and warned them that if any of them had been participating in union efforts to destroy the system set up by the company, or was opposed to the company's policy, he would be regarded as hostile to the company. A similar speech was delivered to the printers by the superintendent of the bleachery. Notwithstanding these warnings, the five printers subsequently discharged answered the subpoena of the Board and testified at the representation hearing, contrary to the company's contention that they had not exercised any genuine supervisory authority in the performance of their duties.

Thereafter, on July 26, 1955, as we have seen, the Board rendered a decision as to the supervisory status of the printers in favor of the company. About a week later, in August, 1955, the company notified the printers of the Board's decision and advised those who disagreed to seek employment elsewhere. A few days later the union petitioned for a rehearing and thereafter, on August 19, the company dis-

charged the five men, telling them the two print rooms were to be combined and that the company was not satisfied with the way in which they had carried out their duties as unit supervisors. The decision to discharge the five men was taken at a conference of the top officials of the company with their attorney but without consultation with the immediate supervisors of the men. Under these circumstances it was not unreasonable for the Board to infer that the men were discharged on account of their testimony and the inference is further supported by the evidence which shows that the work of the men as operators of the printing machines was well performed and was satisfactory to their supervisors in the printing rooms.

The explanation and defense of the company is that it discharged the men in connection with operational changes in the business in August 1955, consisting of the consolidation of the print rooms and the elimination of certain supervisory employees, and that the five men selected for discharge were let go because they were not satisfactorily performing their duties as supervisors. It is contended that the Board's decision fails to recognize the established legal principle that insubordination is an adequate cause for discharge and that the Board may not substitute its own ideas of discipline in management for those of the employer. See **N. L. R. B. v. Martell Mills**, 4 Cir., 114 F. 2d 624, 633; **Local No. 3 etc, v. N. L. R. B.**, 8 Cir., 210 F. 2d 325, 329; **N. L. R. B. v. Williamson-Dickie Mfg. Co.**, 5 Cir., 130 F. 2d 260, 267.

We do not think that we would be justified in rejecting the findings and conclusions of the Board on this point. The action of the five men was without a doubt offensive and may have seemed insubordinate to the company; but the Board may well have thought that the company's defense was specious since the evidence showed that the printers operated their machines in a satisfactory manner and were

not discharged until after they had given testimony in favor of the union. The evidence does indicate that some changes of personnel were made in the print rooms at or about the time the men were discharged, but it fails to demonstrate convincingly either that a substantial reduction in personnel was required or that the selection of the five men for discharge from the list of printers had no relation to their hostile testimony. In short, it cannot be said that the Board was completely wrong in holding that the men were discharged because they supported the union.

We *find no prejudicial error in the rulings* of the examiner and the Board on the questions of evidence and no ground for the remand of the case by this court to the Board to take additional testimony. The question was first raised on March 19, 1956, by a petition of the company in which it asked the Board to vacate its second decision of March 13, 1956, denying supervisory status to the machine printers, and to reopen the record for the taking of additional testimony. It was raised a second time at the examiner's hearing on September 18 and 19, 1956, at which the charges of unfair labor practice on the part of the company were considered and certain testimony offered by the company was rejected. Finally, the question was raised in a petition to this court, filed shortly before the argument of the appeal, in which the company asked the court to remand the case to the Board under 28 U. S. C., § 160 (e) with direction to permit the company to adduce additional evidence in support of its defense to the unfair labor practice charges.

The nature of the proffered testimony is shown in the last mentioned petition. It comprises an offer to show that in August 1955, subsequent to the first decision of the Board on July 26, 1955, the company consolidated its print rooms, abolished the position of section foremen and transferred the supervisory duties to the unit supervisors in addi-

tion to the authority which they previously possessed; and that thereafter the unit supervisors exercised independent judgment on many occasions in the exercise of their supervisory responsibilities, and that the discharged men unsuccessfully carried out the responsibilities assigned to them.

Offers of testimony along these lines were rejected by the Board and later by the examiner on the general ground that they constituted an attempt to reopen the decision of the Board in regard to the supervisory status of the printers without showing that the evidence was not available when the question was pending before the Board and before its final decision was made. The changes in the print rooms were made in August 1955, shortly after the Board granted the rehearing on the supervisory question at the request of the union and before the rehearing took place. The testimony was therefore available to the company at that time but it made no request for an opportunity to show that substantial changes had been made of the status of the printers which would support and strengthen the position which the Board had previously made. Under these circumstances there was no abuse of the sound discretion vested in the Board to refuse to reopen the case. It is generally held that one who desires a new trial in order to adduce new evidence must show reasonable diligence to produce the facts at the original trial and also that the new evidence is not merely cumulative to that which was then produced. **Blytheville Cotton Oil Co. v. Kurn**, 6 Cir., 155 F. 2d 467, 470; **Chemical Delinting Co. v. Jackson**, 5 Cir., 193 F. 2d 123, 127. Furthermore, it must be borne in mind that the company's view as to what constitutes supervisory status differs from that of the Board and that the offer of the company did not specify with clearness how the additional testimony differed in its character from that already considered. The Board had no reason to believe at the time that the petition for remand was made that the duties of the printers in August differed mate-

rially from those which it had previously found to be lacking in a bona fide supervisory character.

For these reasons there was no error on the part of the examiner in rejecting the same testimony at the unfair labor practice hearing. He was justified in concluding that the offer was primarily an effort to reopen a question which had been decided by the Board at the representation hearing. He had the additional ground that the proffered testimony related to the question of supervisory status rather than to the charge that the printers had been discharged for their union affiliation.

The petition to remand the case to the Board for the taking of additional testimony is denied. A decree enforcing the decision and order of the Board will be entered.

APPENDIX C.

United States Court of Appeals
for the Fourth Circuit

No. 7654.

National Labor Relations Board, Petitioner.

vs.

Southern Bleachery and Print Works, Inc., Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

This court having on July 29, 1958, rendered its decision denying the motion of the respondent to remand and enforcing the order of the National Labor Relations Board in the above entitled cause, and the respondent having on August 27, 1958, filed a petition for a rehearing of the said cause, and the same having been fully considered,

It is now here ordered by this court that the rehearing asked for be, and the same is hereby, denied.

October 13, 1958.

Simon E. Sobeloff,
Chief Judge, Fourth Circuit.

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	3
I. Proceedings before the Board	3
II. The decision of the court of appeals	10
Argument	11
Conclusion	15

CITATIONS

Cases:	
National Labor Relations Board v. *Leland-Gifford Co.*, 200 F. 2d 620	12, 13
National Labor Relations Board v. *Quincy Steel Casting Co.*, 200 F. 2d 293	12
Ohio Power Co. v. *National Labor Relations Board*, 176 F. 2d 385, certiorari denied, 338 U.S. 899	13
Pittsburgh Plate Glass Co. v. *National Labor Relations Board*, 313 U.S. 146	14
Statutes:	
National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*):	
§ 2(3)	3
§ 2(11)	3
§ 8(a)(1)	3, 9
§ 8(a)(3)	3, 9
§ 8(a)(4)	3, 9
§ 8(a)(5)	3, 9

495140—59——1

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 632

SOUTHERN BLEACHERY & PRINT WORKS, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 29–39) is reported at 257 F. 2d 235. The original decision of the National Labor Relations Board in the representation proceeding (B.A. 1–2)[1] is unreported. The subsequent decisions of the Board in the representation proceeding (B.A. 3–11, 32–35) and the unfair labor practice proceeding (B.A. 36–55) are reported at 115 N.L.R.B. 787, 1526 and 118 N.L.R.B. 299.

[1] "B.A." and "R.A." refer to the appendices filed by the Board and petitioner, respectively, in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1958. A petition for rehearing was denied on October 13, 1958. The petition for a writ of certiorari was filed on January 8, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the finding of the National Labor Relations Board in a representation proceeding that certain employees were not "supervisors" was supported by the evidence.

2. Whether the trial examiner, in a subsequent unfair labor practice proceeding charging a refusal to bargain with the certified union and discriminatory discharges, properly excluded evidence on the issue whether the employees were "supervisors" on the ground that the issue had been fully litigated in the representation proceeding.

3. Whether the trial examiner, while allowing the employer to show "specific acts" of dereliction of duty by the employees in defense to a charge of discriminatory discharges, abused his discretion in excluding, on the ground that it was an attempt to reopen the "supervisor" issue, generalized testimony that the employees had not "carried out the duties and functions and responsibilities" assigned to them as "Unit Supervisors."

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151,

et seq.) are set forth in Appendix A of the petition (Pet. 23–26).

STATEMENT

I

PROCEEDINGS BEFORE THE BOARD

In a representation proceeding, which forms part of the record here, the National Labor Relations Board determined that petitioner's machine printers were employees within the meaning of § 2(3) and (11) of the National Labor Relations Act and constituted an appropriate bargaining unit. Thereafter the Board certified the Machine Printers Beneficial Association ("the Union") as the bargaining representative of these employees. Petitioner refused to bargain with the Union on the ground, which it had unsuccessfully urged before the Board, that the machine printers were supervisory employees and hence not within the coverage of the Act. In the present proceeding, the Board found that petitioner had violated § 8(a)(5) and (1) by its refusal to bargain with the Union, and also that petitioner violated § 8(a)(1), (3) and (4) by discharging five of the machine printers for giving testimony against the petitioner in the representation case. The Board's subsidiary findings and conclusions may be summarized as follows:

A. *The representation case.*—The Union, on March 21, 1955, petitioned the Board for an election in a unit of petitioner's workers designated generally as "machine printers, including journeymen and apprentices" (B.A. 1). Petitioner contended that the unit was inappropriate since the printers were "super-

visors." The Board sustained this contention and dismissed the petition (B.A. 1–2). Thereafter the Board granted the Union's petition for reconsideration and oral argument (B.A. 3, R.A. 81–85). After oral argument held on September 27, 1955, in which all parties participated, the Board on March 13, 1956, with one member dissenting, reversed its prior decision, determined that the machine printers were employees and not supervisors, and ordered an election (B.A. 3–17).

At the time of the hearing in the representation proceeding, petitioner employed approximately 40 machine printers, of whom 30 worked in 3 shifts in the print works, and 10 worked in 2 shifts in the shirting print department (B.A. 4, 89–90). The total complement of the print room was 116, including 11 who were admittedly supervisors (*i.e.*, other than the machine printers); the total complement of the shirting print department was 41, including 6 admitted supervisors (B.A. 4, 89–90, 137, 138; 125, 163). The print room had 11 textile printing machines and the shirting print room had 4 (B.A. 8, 134–135). Machine printers qualify for the operation of these machines by a seven-year apprenticeship (B.A. 8, 154). Each printing machine is operated by a crew of four men, including a machine printer who is primarily responsible for the production and quality of the printed cloth and also exercises some authority over his less skilled helpers[3] (B.A. 4, 7, 88–89, 161–162). All the

[3] A back tender who stands behind the machine, a grey tender who stands at the side and a can boy for every two machines. The machine printer stands in front of the machine.

machine printer's faculties are required to assure that the cloth is properly set and conforms to the design before him (B.A. 5, 155–161). Approximately two-thirds of his time is devoted to the actual operation of the machine and most of the remainder to readying the machine for the next operation (B.A. 5, 104). While the machine is in operation, the printer never leaves it unless relieved by a foreman (B.A. 5, 161–163).

Prior to June 1950, the machine printers were concededly not supervisors.[3] In June 1950, petitioner changed the job designation of machine printer to that of "unit supervisor" and gave each printer a list of 10 instructions entitled "Basic Responsibility of Unit Supervisors"[4] (B.A. 4, 62–63). The instructions related to the responsibility of the printer as to the delivery of the maximum production with satisfactory quality; correct printing of the cloth; decisions as to material requirements and mechanical replacements of the unit; checking the time cards of the workers in his unit; recommending their hiring and firing and rate increases; and the taking of the necessary steps to report, reprimand, or recommend disciplinary actions upon infractions of company rules (B.A. 62–63). In addition, petitioner changed the method of computing the printers' pay by increasing their weekly base by $25.00 in lieu of a lower base pay plus a production bonus (B.A. 5, 6). They continued to receive a guar-

[3] In 1943, 1948 and 1949, the Board had conducted elections in a unit of machine printers, but no bargaining representative had been selected in any of them (B.A. 4).

[4] The list is reprinted at pp. 5–6 of the petition.

anteed base pay plus time and one-half for work over 40 hours per week, an arrangement not applicable to the group of admitted supervisors who were paid a straight salary (B.A. 6–7, 108, 138, 147).

The duties of the machine printers in setting up and operating their machines continued to require their constant attention for most of their working time, and no material change in their duties occurred after June 1950 (B.A. 5, 90–104, 109–110, 124–133, 142). Nor were they given greater responsibility for the quality of the work product (B.A. 6, 95–96, 127–128, 139). After June 1950, petitioner required the printers to initial certain forms prepared by admitted supervisors and given to the printers routinely for the addition of their initials, such as merit increase slips, time cards, accident reports and material requisition slips (B.A. 6–7, 92–97, 99–100, 110–113, 127–132). While some of the slips signed by the printers contained recommendations that employees be hired, fired, given merit increases, and be promoted or demoted, the signing was done as a matter of routine without the exercise of independent judgment and in some instances without examination or inquiry by the printers (B.A. 6–7, 99–100, 127, 130–131, 135–136).[5]

On the basis of the foregoing findings of fact the Board concluded (B.A. 10):

> * * * we are satisfied that the purported 1950 change in the status of the machine printers did

[5] Pay increases were usually allowed after a fixed period of time, and replacements for absent helpers were selected from a list not available to the printers, thus negativing any implication that the printers' "recommendations" were significant (B.A. 6, 7, 100–102).

not, in fact or in law, convert the machine printers to supervisors or deprive them of their employee status. The principal effect of the instructions given to the machine printers was to codify the control previously exercised by them over the less experienced grey tenders, back tenders and can boys, a control, as we have indicated, that is customarily exercised by any skilled craftsmen over their helpers and apprentices. To the extent that the 1950 instructions attempted to delegate to the machine printers power or authority beyond that of a craftsman, the absence, for all practical purposes, of the exercise of such authority negatives its existence. We find, therefore, that the machine printers are employees within the meaning of the Act.

Accordingly, the Board directed that an election be held to determine whether the employees wished to be represented by the Union (B.A. 10–11).

On March 22, 1956, petitioner filed a petition to vacate the decision of March 13, 1956, and to reopen the record for the taking of additional testimony (B.A. 18–19). Petitioner asserted that in August 1955 (prior to the oral argument on the Union's petition for reconsideration), it had abolished its shirting print department, consolidated all its printing operations into a single print room, abolished the jobs of its section foremen, and delegated the latter's duties to the machine printers. Petitioner alleged generally, but without particularizing, that as a result of the elimination of the section foremen's jobs, the machine printers were vested "with even more responsibility,

authority, and direction and power to enforce" the same. Petitioner further alleged that on November 11, 1955 (following the oral argument but prior to the Board's supplemental decision), it had issued to the machine printers "a recapitulation, reiteration and respecification" of their "duty, authority, and responsibilities"; that the machine printers were exercising those functions; and that those functions "are supervisory in nature." Petitioner did not, however, specify what the new instructions were or wherein they delegated any supervisory functions to the machine printers.

The Board denied the petition "because nothing further has been offered that warrants modifying the Board's decision" (B.A. 20).

The election was held on April 10, 1956 and was won by the Union (B.A. 32–33). The Board agent conducting the election refused petitioner's request that each voter be challenged as a supervisor (B.A. 20–22, 33). As found by the Regional Director in an investigation of the objections to the conduct of the election filed by petitioner, the Board agent properly refused the request for challenges after petitioner's counsel told him that he was not in possession of any fact not previously presented to the Board (B.A. 24–26). In its exceptions to the Regional Director's recommendations that the objections be overruled, petitioner repeated its contention that the direction of the election had been improper, but it did not challenge the Regional Director's finding concerning the statement by petitioner's counsel to the Board agent that he had no new evidence on the alleged supervisory status of the ma-

chine printers (B.A. 26–32, 33). On June 8, 1956, the Board concluded that the exceptions raised no substantial or material factual issues with respect to the conduct or results of the election and certified the Union as collective bargaining representative for the employees involved (B.A. 35).

B. *The unfair labor practice case.*—Following the certification of the Union, petitioner admittedly refused to bargain with it because of its claim that the machine printers were supervisors (B.A. 38, 74–75). In addition, petitioner had, on August 29, 1955, discharged five machine printers who had testified against it at the representation hearing held on May 5 and 6, 1955, allegedly because the two print rooms were to be combined, and because petitioner was not satisfied with the way these employees had carried on their duties as supervisors (B.A. 54–55, 176–179). Upon charges that both acts were unfair labor practices, the Board, after a hearing, concluded that petitioner's refusal to bargain with the Union violated § 8(a)(5) and (1) of the Act (B.A. 54–55). It also concluded, for reasons set forth more fully in its decision, that petitioner had discharged the five employees because they testified adversely to it in the Board's representation proceeding and that it had thereby violated § 8(a)(1), (3) and (4) of the Act (B.A. 54). The Board also rejected petitioner's contention that the trial examiner in the unfair labor practice proceeding had erroneously refused to permit petitioner to introduce evidence bearing upon the supervisory duties of the machine printers and, in support of its further claim that the dismissals were

not unlawful, the failure of the discharged printers to carry out those duties (B.A. 54).

The Board's order required petitioner to cease and desist from the unfair labor practices found; to bargain collectively with the Union; to offer reinstatement with back pay to the discharged employees; and to post appropriate notices (B.A. 56–57).

II

THE DECISION OF THE COURT OF APPEALS

The court of appeals upheld the Board's findings as adequately supported by the record and enforced the Board's order (Pet. 27–37). With respect to the Board's finding that the machine printers were not supervisory employees, the court stated that an "employer cannot make a supervisor out of a rank and file employee by giving him the title and the theoretical power to perform one or more of the [statutorily] enumerated supervisory functions. The important thing is the possession and exercise of actual supervisory duties and authority and not the formal title. It is a question of fact in every case as to whether the individual is merely a superior workman or lead man who exercises the control of a skilled worker over less capable employees, or who is a supervisor who shares the power of management." Tested by this principle, the court concluded, "it cannot be said" that the Board's finding that the machine printers were not in fact vested with actual supervisory authority "was unwarranted by the evidence or without support in the decisions of the court" (Pet. 34).

The court found no prejudicial error in the ruling of the Board in the representation case denying petitioner's motion, filed after the Board's Supplemental Decision of March 13, 1956, to adduce additional evidence relating to the claimed supervisory status of the machine printers. The court upheld the ruling as a proper exercise of the Board's discretion (Pet. 37–38). The court also approved the ruling of the trial examiner in the unfair labor practice proceedings refusing to permit petitioner to adduce testimony with respect to the duties of the machine printers. The examiner, the court stated, "was justified in concluding that the offer was primarily an effort to reopen a question which had been decided by the Board at the representation hearing" and hence it was not error for the examiner to reject that testimony (Pet. 39). For these reasons the court also denied petitioner's motion to remand the case to the Board for the taking of additional testimony concerning the duties of the machine printers (Pet. 39).

ARGUMENT

1. Petitioner asserts (Pet. 13–18) that the Board's determination that the machine printers were employees and not supervisors rests upon an erroneous test, namely, as petitioner phrases it, "that it is the frequency of the exercise of delegated supervisory authority which determines whether or not a given employee is in fact a supervisor within the meaning of the Act." This contention plainly misconceives the basis of the Board's determination in the instant case. As the court below observed (Pet. 34), in ascertaining

whether or not certain employees have supervisory status, the "important thing is the possession and exercise of actual supervisory duties and authority and not the formal title. It is a question of fact in every case * * *." Accord: *National Labor Relations Board* v. *Quincy Steel Casting Co.*, 200 F. 2d 293, 296 (C.A. 1); *National Labor Relations Board* v. *Leland-Gifford Co.*, 200 F. 2d 620, 625 (C.A. 1). It would seem a matter of common sense that the absence for all practical purposes of any exercise of such authority by the employees in question, although not decisive, is nevertheless a significant factor to be taken into account in ascertaining whether the employer has in fact clothed the employees with actual, as distinguished from nominal or fictitious, supervisory authority. That is what the Board did here. Looking to all the surrounding circumstances, including the absence of any exercise of supervisory authority by the machine printers, the Board concluded that they had not in fact been vested with any real supervisory authority (*supra*, p. 6). This is not to say, as petitioner asserts, that the Board has made the existence of supervisory authority turn solely upon its exercise or non-exercise. On the contrary, all that the Board has done is to weigh that factor as probative and relevant evidence bearing upon the existence or non-existence of supervisory authority. In this posture, the case presents simply a factual issue and raises no question warranting review by this Court.

Contrary to petitioner's contention, neither of the two cases which it cites (Pet. 13) is in conflict with the decision below. In those cases the First and Sixth Circuits merely held that where an employee admittedly possesses or is clothed with real supervisory authority, the sporadic or infrequent exercise of such authority does not diminish his supervisory status. *National Labor Relations Board* v. *Leland-Gifford Co.*, 200 F. 2d 620, [illegible] (C.A. 1); *Ohio Power Co.* v. *National Labor Relations Board*, 176 F. 2d 385, 388 (C.A. 6), certiorari denied, 338 U.S. 899. That is not this case, for here the critical question was whether the machine printers ever in fact possessed any real supervisory authority.

2. Petitioner further asserts (Pet. 18–21) that the trial examiner erroneously refused to permit it (a) to adduce evidence in the unfair labor practice hearing upon the supervisory status of the machine printers and (b) to pursue a line of inquiry as to whether or not the discharged employees "carried out the duties and functions and responsibilities" of "Unit Supervisors" for the purpose of showing that petitioner had discharged them, whether supervisors or not, for their failure to do so (B.A. 190; Pet. 5–6). The trial examiner ruled that he would not permit petitioner to "relitigate the Board's findings and conclusions" with respect to the supervisory status of these employees but also stated that he would "permit the question of the witness concerning specific acts" of dereliction of duty by the five employees (B.A. 191).

To begin with, as the court below observed (Pet. 39) and as the record bears out (B.A. 167–168, 190–194, 210–211; R.A. 90, 111–115), the trial examiner was justified in concluding that the line of inquiry petitioner sought to pursue "was primarily an effort to reopen a question which had been decided by the Board at the representation hearing," *i.e.*, the supervisory status of the machine printers. In this setting, the examiner's ruling was correct. For, as this Court has stated in a similar situation, "a single trial of the issue was enough." *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 313 U.S. 146, 162. Secondly, insofar as petitioner may have sought to show that the machine printers had failed to carry out their assigned duties and had been discharged for that reason, petitioner is in no position to assert prejudicial error. For the examiner expressly stated that while he would not permit the generalized inquiry described above, he would permit "question of the witness concerning specific acts" of dereliction of duties by the discharged machine printers (B.A. 191). If, as petitioner asserts, it sought to adduce this evidence, not for the purpose of relitigating the supervisory status of the employees, but rather to establish that it had discharged them for dereliction of duty, it should have been an easy matter to follow the line of inquiry which the examiner would have permitted. Petitioner's failure to do so (B.A. 194) serves only to emphasize that petitioner was pursuing its basic strategy to reopen the issue which the Board had decided adversely to it in the representation proceeding.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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